Supreme Court, U.S.
FILED
JUL 26 1996
CLERK

No. 95-974

In the Supreme Court of the United States

OCTOBER TERM, 1995

ARIZONANS FOR OFFICIAL ENGLISH, ET AL.,
PETITIONERS

v.

STATE OF ARIZONA, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE ADDRESSING STANDING

WALTER DELLINGER
Acting Solicitor General
FRANK W. HUNGER
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
STEPHEN W. PRESTON
Deputy Assistant Attorney General
IRVING L. GORNSTEIN
Assistant to the Solicitor General
ANTHONY J. STEINMEYER
SCOTT MC INTOSH
Attorneys
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

The United States will address the following question:

Whether petitioners have standing under Article III of the Constitution to pursue appellate review.

TABLE OF CONTENTS

	Page
Interest of the United States	1
Statement	2
Summary of argument	7
Argument:	
Petitioners do not have standing to pursue appellate review	9
A. Private individuals do not have standing to seek appellate review of a judgment the sole effect of which is to prevent a State from enforcing one of its laws against another person	9
B. AOE does not have standing to appeal based on legislative standing, representational standing, or its efforts in sponsoring the initiative	14
C. Park's standing to enforce Article XXVIII in state court does not give him standing to seek appellate review in federal court	24
Conclusion	26

TABLE OF AUTHORITIES

Cases:

Alfred L. Snapp & Son, Inc. v. *Puerto Rico ex rel. Barez*, 458 U.S. 592 (1986)	23
Asarco, Inc. v. *Kadish*, 490 U.S. 605 (1989)	25
Barnes v. *Kline*, 759 F.2d 21 (D.C. Cir. 1985), vacated as moot, 479 U.S. 361 (1987)	19
Bender v. *Williamsport Area School District*, 475 U.S. 534 (1986)	22
Buckley v. *Valeo*, 424 U.S. 1 (1976)	15, 21
Burke v. *Barnes*, 479 U.S. 361 (1987)	15-16
Cheng Fan Kwok v. *INS*, 392 U.S. 206 (1968)	20, 21
Coleman v. *Miller*, 307 U.S. 433 (1939)	17, 18

Cases—Continued: Page

Continental Ill. Nat. Bank v. *State of Wash.*, 696 F.2d 692 (9th Cir. 1983) 13
Diamond v. *Charles*, 476 U.S. 54 (1986) 8, 10, 11, 12, 24
Dryer v. *Illinois*, 187 U.S. 71 (1902) 16
Freeman v. *Lane*, 962 F.2d 1252 (7th Cir. 1992) 25
INS v. *Chadha*, 462 U.S. 919 (1983) 15, 17, 19, 20
Karcher v. *May*, 484 U.S. 72 (1987) 8, 16, 17, 18
Lewis v. *Casey*, No. 94-1511 (June 24, 1996) 14-15
Lockhart v. *Fretwell*, 506 U.S. 364 (1993) 25
Lujan v. *Defenders of Wildlife*, 504 U.S. 555 (1992) 8, 10, 22, 25
Moore v. *Sims*, 442 U.S. 415 (1979) 12
Mountain States Legal Found. v. *Costle*, 630 F.2d 754 (10th Cir. 1980), cert. denied, 450 U.S. 1050 (1980) 16
Northeastern Fla. Chapter, Associated Gen. Contractors v. *Jacksonville*, 508 U.S. 656 (1993) 9
Ornelas v. *United States*, 116 S. Ct. 1657 (1996) 20
Sierra Club v. *Morton*, 405 U.S. 717 (1972) 12
Springer v. *Philippine Islands*, 277 U.S. 189 (1928) 21
The Don't Bankrupt Washington Committee v. *Continental Ill. Nat. Bank*, 460 U.S. 1077 (1983) 8, 13, 14
United Food & Commercial Workers Union Local 751 v. *Brown Group, Inc.*, 116 S. Ct. 1529 (1996) 9, 22, 23
United States v. *Articles of Drug*, 818 F.2d 569 (7th Cir. 1987) 12
United States v. *Lovett*, 328 U.S. 303 (1946) 20
United States v. *Mendoza*, 464 U.S. 154 (1984) 12
United States v. *Richardson*, 418 U.S. 166 (1974) .. 24
Yniguez v. *Arizonans for Official English*, 42 F.3d 1217 (9th Cir. 1995) 7

Constitution and statutes: Page

U.S. Const.:
Art. I, § 1 15
Art. I, § 7, Cl. 2 (Pocket Veto Clause) 15
Art. I, § 10, Cl. 1 (Contract Clause) 13
Art. II, § 3 15
Art. III ..... *passim*
Art. V 18
Art. VI, Cl. 2 (Supremacy Clause) 25
Amend. I 3, 7, 10, 26
Amend. XI 4
Amend. XIV (Equal Protection Clause) 3
Ariz. Const.:
Art. IV 21
§ 1 2
Art. VIII, Pt. 1 24
Art. XXVIII ..... *passim*
§§ 1(1)-(2) 2
§ 1(3) 2
§ 1(3)(a) 2
§ 3(1)(a) 2
§ 3(2) 2
§ 4 ..... 2, 5, 24, 25, 26
Civil Rights Act of 1964, Tit. VI, 42 U.S.C. 2000d *et seq.* 3
Immigration and Nationality Act, 8 U.S.C. 1254(c)(2) (1976) 19
2 U.S.C. 288e(a) 15
28 U.S.C. 1252 (1976) 19
28 U.S.C. 1254 18
28 U.S.C. 2403(b) 6
42 U.S.C. 1983 3
Ariz. Rev. Stat. Ann. § 19-101 *et seq.* (1990) 2, 17

Miscellaneous:

7A C.J.S. *Attorney General* § 11(c) (1980) 16

In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-974

ARIZONANS FOR OFFICIAL ENGLISH, ET AL.,
PETITIONERS

v.

STATE OF ARIZONA, ET AL.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE
ADDRESSING STANDING

INTEREST OF THE UNITED STATES

The United States has an interest in ensuring that disputes over the constitutionality of state and federal laws are resolved by federal courts only when they are presented in the context of an Article III "case" or "controversy." The United States has a particular interest in ensuring that, when the government declines to appeal a judgment entered against it, persons without Article III standing are not permitted to appeal that judgment. The resolution of the question whether petitioners have standing to seek appellate review implicates those interests.

STATEMENT

1. Article XXVIII of the Arizona Constitution was adopted by Arizona voters in November 1988 through a ballot initiative. Pet. App. 4a, 97a; see generally Ariz. Const. Art. IV, § 1 (initiative and referendum); Ariz. Rev. Stat. Ann. § 19-101 *et seq.* (1990) (same). Article XXVIII declares English to be the "official language" of Arizona and "the language of * * * all government functions and actions." Ariz. Const. Art. XXVIII, § 1(1)-(2). It further provides that, with certain specified exceptions, "this State and all political subdivisions of this State shall act in English and in no other language." *Id.* §§ 1(3)(a), 3(1)(a). The duty to "act in English" applies to "the legislative, executive, and judicial branches of government," and to "all government officials and employees during the performance of government business." *Id.* § 1(3). Article XXVIII contains exceptions that permit languages other than English to be used: (1) to assist students who are not proficient in English to the extent required by federal law; (2) to comply with other federal laws; (3) to teach foreign languages; (4) to protect public health or safety; and (5) to protect the rights of criminal defendants or victims of crime. *Id.* § 3(2). Article XXVIII also vests any person who resides in or does business in Arizona with standing to bring suit in state court to enforce Article XXVIII. *Id.* § 4. See Pet. vi-viii.

At the time Article XXVIII was adopted, respondent Maria-Kelley Yniguez was employed in the Arizona Department of Administration to process medical malpractice claims asserted against the State. Pet. App. 5a, 98a. Yniguez spoke Spanish to

claimants who spoke only Spanish and Spanish and English to claimants who were bilingual. *Ibid.* Believing that Article XXVIII would render her vulnerable to discipline if she continued to speak Spanish in those circumstances, she ceased to do so. *Id.* at 5a. Yniguez then filed suit in federal district court under 42 U.S.C. 1983 against the State of Arizona, its Governor, its Attorney General, and its Director of Administration. Yniguez claimed that Article XXVIII is facially invalid under the First Amendment, the Equal Protection Clause of the Fourteenth Amendment, and Title VI of the Civil Rights Act of 1964, 42 U.S.C. 2000d *et seq.* Pet. App. 5a-6a, 97a. She requested a declaratory judgment, an injunction, and "all other relief that the Court deems just and proper." *Id.* at 6a, 95a n.1; see J.A. 55-60 (amended complaint).[1]

On January 24, 1989, the Attorney General of Arizona rendered an opinion concluding, *inter alia*, that although Article XXVIII requires that official acts of the State and political subdivisions be conducted in English, it does not prohibit the use of a language other than English where necessary to ensure the fair and effective delivery of services to members of the public. J.A. 61-76.

In a decision rendered on February 6, 1990 (Pet. App. 97a-114a), the district court dismissed the action as against all of the defendants except the Governor in her official capacity, *id.* at 99a-104a, and entered a declaratory judgment holding that Article XXVIII is unconstitutional on its face, *id.* at 105a-111a. The

---

[1] A State legislator, Jaime Gutierrez, subsequently joined Yniguez as a plaintiff. The district court dismissed Gutierrez's claims (Pet. App. 112a), and he did not pursue an appeal.

court recognized that the Eleventh Amendment does not bar a suit for declaratory and injunctive relief against state officers in their official capacity if they have some connection to the enforcement of an allegedly unconstitutional state law. *Ibid.* But the court dismissed the Attorney General on the ground that he had no authority to enforce Article XXVIII against Yniguez; and it dismissed the Director of Administration on the ground that she had not threatened to enforce Article XXVIII against Yniguez. *Id.* at 100a-104a.[2] By contrast, the court determined that there was an Article III case or controversy between Yniguez and the Governor, because the Governor had stated that she expected all civil service employees to comply with Article XXVIII, and because, under Yniguez's interpretation of Article XXVIII, disciplinary sanctions could be imposed against Yniguez if she continued to speak Spanish during the course of her official duties. *Id.* at 102a-103a.

On the merits, the district court held that Article XXVIII is facially invalid under the First Amendment. Pet. App. 105a-109a. In so ruling, the court declined to rely on Ynigues's asserted "right to speak the language of her choice during the performance of her official duties." *Id.* at 106a. Rather, the court found that Article XXVIII inhibited the constitutionally protected speech of others, including the right of state legislators to speak to constituents in languages other than English, the right of state employees to comment officially on matters of public

[2] The court previously had dismissed the State of Arizona as a defendant on Eleventh Amendment grounds. Pet. App. 99a-101a.

concern in languages other than English, and the right of state judges to perform marriage ceremonies in languages other than English. Pet. App. 106a-107a. The court granted Yniguez's request for declaratory relief, but denied her request for an injunction on the ground that she had not established a threat of enforcement sufficient to warrant that relief. *Id.* at 111a-113a. The Governor decided not to appeal. *Id.* at 8a.

2. Petitioners Arizonans for Official English (AOE) and Robert D. Park then moved to intervene as defendants in order to pursue an appeal. J.A. 142. AOE is an unincorporated association that sponsored the ballot initiative that led to the adoption of Article XXVIII; Park is AOE's chairman. *Ibid.* The Attorney General of Arizona also sought to intervene in order to appeal. J.A. 141. In April 1990, the district court denied the motions to intervene, J.A. 138-149, holding, *inter alia*, that AOE and Park did not have Article III standing to appeal. J.A. 142-148.

In July 1991, the Ninth Circuit reversed the denial of petitioners' intervention motion, J.A. 157-184, holding that AOE and Park had standing under Article III to appeal the district court's declaratory judgment. J.A. 162-171. With respect to AOE, the court reasoned that state legislatures have standing to defend the constitutionality of state statutes and that AOE, as "the principal sponsor" of Article XXVIII, "stands in an analogous position to a state legislature." J.A. 166-167. With respect to Park, the court reasoned that Park could sue Yniguez in state court under Section 4 of Article XXVIII, and that the likelihood that he would do so was sufficiently great to create a live controversy between Park and Yniguez for Article III purposes. J.A. 169-171.

The court of appeals also held that the district court had correctly refused to permit the Attorney General to reenter the case as a full party. The court determined that, because the Attorney General had succeeded in having the case against him dismissed, he was estopped from reentering the case as a party. J.A. 179-181. The court nonetheless permitted the Attorney General to intervene in petitioners' appeal under 28 U.S.C. 2403(b) for the limited purpose of arguing in support of the constitutionality of Article XXVIII. J.A. 181-183.

3. Following the court of appeals' decision on intervention, the State notified the court that Yniguez had left her state job in April 1990, and it suggested that the case might therefore be moot. J.A. 187. The court of appeals held that the change in Yniguez's status did not render the case moot, because Yniguez could pursue a claim against the Governor for nominal damages. Pet. App. 94a-95a. Although Yniguez had not expressly requested nominal damages in her complaint, the court concluded that her request for "all other relief that the [District] Court deems just and proper" was sufficient. *Id.* at 95a. Yniguez had not appealed from the district court's judgment insofar as it failed to award nominal damages, but the court of appeals ruled that petitioners had to file another notice of appeal and that Yniguez could file a timely cross-appeal within 14 days thereafter. *Ibid.* In December 1992, petitioners filed a notice of appeal from the district court's declaratory judgment, and Yniguez filed a cross-appeal regarding nominal damages. *Id.* at 9a.[3]

[3] During the pendency of the appeal, the court of appeals granted a motion by respondents Arizonans against Constitutional Tampering (ACT) and its chairman, respondent Thomas Espinosa, to intervene as appellees in support of Yniguez. Pet. App. 10a-11a. ACT was the principal opponent of the ballot initiative. *Ibid.* The court of appeals did not reach the question whether ACT and Espinosa have standing under Article III to defend the district court's award of declaratory relief to Yniguez. *Id.* at 11a.

4. In December 1994, a panel of the Ninth Circuit affirmed the district court's declaratory judgment and reversed the district court's failure to award Yniguez nominal damages. *Yniguez* v. *Arizonans for Official English*, 42 F.3d 1217 (1995). The court of appeals agreed to rehear the case en banc. Pet. App. 4a. In October 1995, the en banc court of appeals reinstated the panel opinion with minor alterations. *Ibid.* By a six to five vote, the en banc court held that Article XXVIII is facially unconstitutional because it violates the First Amendment rights of state employees. *Id.* at 21a-59a.

SUMMARY OF ARGUMENT

A. In order to seek appellate review of a judgment, intervenors must satisfy Article III standing requirements. They must therefore show that the judgment invades a legally protected interest that is likely to be redressed by a favorable decision on appeal. Petitioners AOE and Park cannot make that showing. The sole effect of the district court's declaratory judgment is to preclude the State from enforcing Article XXVIII against Yniguez. Only the State suffers an injury in fact from a judgment whose sole effect is to prevent the State from enforcing one of its laws against another person. If the State decides not to appeal such a judgment, private individuals do not have authority to supplant that

decision. *Diamond* v. *Charles*, 476 U.S. 54, 64-65 (1986). Consistent with that understanding of Article III, this Court has summarily rejected an effort by the sponsor of a ballot initiative to appeal a lower court judgment holding an initiative unconstitutional when the State itself had decided not to appeal. *The Don't Bankrupt Washington Committee* v. *Continental Ill. Nat. Bank*, 460 U.S. 1077 (1983).

B. AOE does not have standing based on the concept of legislative standing. A state legislature has standing to appeal a decision holding a state statute unconstitutional only when state law authorizes the legislature to represent the State's interest in court. *Karcher* v. *May*, 484 U.S. 72, 82 (1987). Article XXVIII does not authorize its sponsor to represent the State's interest in court. AOE also has not identified any other provision of Arizona law that provides such authorization. Thus, even if AOE could be analogized to a state legislature, it would not have standing to appeal.

In any event, AOE is not analogous to a state legislature. The fundamental attributes of a state legislature are that its members are elected by the people and it has authority to make laws. AOE does not have either of those attributes. The voters have not elected AOE to represent their interests, and the voters, not AOE, enacted Article XXVIII.

C. Park's standing to enforce Article XXVIII in state court does not supply him with standing to appeal in federal court. An individual's generalized interest in enforcing a law is not sufficient to satisfy Article III, and that interest cannot be converted into a particularized injury simply because state law denominates it as such. *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Moreover, because

state courts are free to exercise their own independent judgment concerning whether Article XXVIII is constitutional, the district court's judgment in this case does not interfere with Park's right to enforce Article XXVIII in state court. Finally, whatever controversy might once have existed between Park and Yniguez by virtue of Park's right to enforce Article XXVIII in state court ended when Yniguez left her state job.

ARGUMENT

PETITIONERS DO NOT HAVE STANDING TO PURSUE APPELLATE REVIEW

A. Private Individuals Do Not Have Standing To Seek Appellate Review Of A Judgment The Sole Effect Of Which Is To Prevent A State From Enforcing One Of Its Laws Against Another Person

Article III of the Constitution limits the power of federal courts to deciding "Cases" and "Controversies." One aspect of the case or controversy requirement is that a party who invokes the jurisdiction of a federal court must have standing to sue. *Northeastern Fla. Chapter, Associated Gen. Contractors* v. *Jacksonville*, 508 U.S. 656, 663 (1993). To establish Article III standing, a party must show "as an 'irreducible minimum' that there [is] (1) an injury in fact, (2) a causal relationship between the injury and the challenged conduct, and (3) a likelihood that the injury will be redressed by a favorable decision." *United Food & Commercial Workers Union Local 751* v. *Brown Group, Inc.*, 116 S. Ct. 1529, 1533 (1996) (*Local 751*). The injury-in-fact requirement refers to "an invasion of a legally protected interest" that is "concrete and particularized" and "actual or

imminent." *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 560 (1992). A generalized interest in the proper application of the Constitution and laws does not satisfy the injury-in-fact requirement. *Id.* at 573-576.

The requirement that a party who invokes the court's jurisdiction must have Article III standing applies to those who seek appellate review as well as those who initiate litigation. *Diamond* v. *Charles*, 476 U.S. 54, 62 (1986). "[T]he decision to seek review must be placed in the hands of those who have a direct stake in the outcome. * * * It is not to be placed in the hands of 'concerned bystanders,' who will use it simply as a 'vehicle for the vindication of value interests.'" *Ibid.* Because the decisions below do not invade any "legally protected interest" held by petitioners, they do not have Article III standing to seek appellate review of those decisions.

The district court entered a declaratory judgment that Article XXVIII of the Arizona Constitution violates the First Amendment, and that judgment ran solely in favor of Yniguez and solely against the Governor of Arizona. Because Yniguez did not obtain class certification, and because the Governor of Arizona was the only defendant, the sole effect of the district court's judgment was to preclude the State of Arizona from enforcing Article XXVIII against Yniguez. The State had standing to seek appellate review of the judgment. *Diamond*, 476 U.S. at 62. But the State, through its Governor, decided not to appeal. The State likewise did not seek review of the court of appeals' decision affirming the district court's declaratory judgment. Private parties do not have standing to supplant the deliberate decision of a State not to appeal a judgment entered against the State or its officials, when the sole effect of that

judgment is to prevent the State from enforcing one of its laws against another person. *Id.* at 64-65.[4]

This Court's decision in *Diamond* is controlling on that point. In *Diamond*, physicians brought suit against Illinois state officials to enjoin a State law governing abortions. After defending the law in the district court and the court of appeals, the State declined to appeal to this Court, and a private physician opposed to abortions who had intervened in the district court sought to appeal the judgment. The Court dismissed the appeal for lack of jurisdiction. The Court held that "an intervenor's right to continue a suit in the absence of the party on whose side intervention is permitted is contingent upon a showing by the intervenor that he fulfills the requirements of Art. III," 476 U.S. at 68, and that the physician had failed to show that he had standing under Article III to appeal from the decision below. *Id.* at 63-68. The Court reasoned that "concerns for state autonomy" preclude private individuals from continuing litigation in defense of a state law after the State has decided not to appeal. *Id.* at 65. The

---

[4] After the Governor declined to appeal the district court's decision, the State's Attorney General sought to intervene as a party in order to appeal. The district court denied intervention. J.A. 140-142. The court of appeals affirmed the denial, except that it permitted the Attorney General to intervene as a non-party in petitioners' appeal. J.A. 179-183. The Attorney General did not seek review of that ruling. Nor did the State or any state official seek review of the court of appeals' decision affirming the district court's judgment declaring Article XXVIII unconstitutional. Accordingly, for present purposes, it must be assumed that the State acquiesced in both the district court's judgment declaring Article XXVIII unconstitutional and the court of appeals' decision affirming that judgment.

Court concluded that "only the State has the kind of 'direct stake' identified in *Sierra Club* v. *Morton*, 405 U.S. [717, 740 (1972)], in defending the standards embodied in [a legal] code." *Diamond*, 476 U.S. at 65.

The holding in *Diamond* is supported by strong practical and institutional considerations. The State itself is in the best position to decide whether there should be appellate review of a judgment entered against the State or its officials, including a judgment that prevents the State from enforcing one of its laws. Principles of federalism reinforce Article III's requirement that a federal court respect the State's decision not to appeal. A State may have a wide variety of reasons for declining to appeal: the decision might have a limited impact; the State might wish to await a case that presents the legal question in a more appealing factual context; or the decision might not interfere with a particular administration's legal views or enforcement priorities. See *United States* v. *Mendoza*, 464 U.S. 154, 160-162 (1984).

Factors such as those could well have affected the State's decision not to seek appellate review of the district court's judgment in this case. Although the legal reasoning in the district court's opinion was broad, the court's declaratory judgment applied only to a single individual, respondent Yniguez, and would not have precedential effect in other cases in federal court. See, *e.g.*, *United States* v. *Articles of Drug*, 818 F.2d 569, 572 (7th Cir. 1987). By the same token, as the district court observed in denying AOE and Park's motion to intervene, the declaratory judgment was not binding on the state courts and accordingly would not affect the ability of Arizona residents to enforce Article XXVIII in state court. J.A. 147-148 (citing *Moore* v. *Sims*, 442 U.S. 415, 428 (1979)).

Moreover, the result reached by the district court was not substantially adverse to the position of the State of Arizona even on the narrow issue of Yniguez's ability to speak English on the job, because the Attorney General of Arizona had in any event interpreted Article XXVIII not to prevent individuals such as Yniguez from providing assistance to persons in a language other than English, "where such assistance is reasonably needed to ensure fair and effective delivery of governmental services to non-English speakers." J.A. 71-72. In short, the State could reasonably have decided that an appeal would not be in the State's interest. Private parties should not be permitted to override such determinations by state officials.

Consistent with the understanding of Article III set forth in *Diamond*, this Court has summarily rejected an effort by sponsors of a ballot initiative to appeal from a court of appeals decision holding the initiative unconstitutional. *The Don't Bankrupt Washington Committee* v. *Continental Ill. Nat. Bank*, 460 U.S. 1077 (1983). In that case, the court of appeals held that an initiative that interfered with the State's contractual obligation to finance three nuclear power plants violated the Contract Clause of the Constitution, Art. I, § 10, Cl. 1. *Continental Ill. Nat. Bank* v. *State of Wash.*, 696 F.2d 692 (9th Cir. 1983). The State defended the initiative in the district court and the court of appeals, but decided not to appeal from the court of appeals' decision. See 82-1445 Mot. of Appellee the United States of America to Dismiss or Affirm at 22-23, 26. The sponsor of the initiative had intervened in the district court, and it sought to appeal the court of appeals' decision to this Court. This Court summarily dismissed the appeal

for want of jurisdiction, "it appearing appellant lacks standing to bring this appeal." 460 U.S. at 1077.

The court of appeals in this case acknowledged the relevance of the analysis in *Diamond*, but concluded that "AOE's and Park's interest in Article XXVIII is qualitatively different from the physician's interest in the Illinois abortion law at issue in *Diamond*." J.A. 165. For reasons that follow, that conclusion is incorrect. There is no relevant distinction between this case and *Diamond*, and petitioners therefore lack standing to seek appellate review.

B. AOE Does Not Have Standing To Appeal Based On Legislative Standing, Representational Standing, Or Its Efforts In Sponsoring The Initiative

1. The court of appeals permitted AOE to appeal from the district court's judgment by invoking the concept of "legislative standing." J.A. 165. The court concluded that a legislature has standing to defend a statute it enacts. J.A. 165-167. It then reasoned that AOE occupies the same position with respect to Article XXVIII that a state legislature occupies with respect to a state statute. *Ibid.* That reasoning is seriously flawed.

a. To begin with, a legislature does not automatically have Article III standing to appeal a judgment holding unconstitutional or otherwise restricting the enforcement of laws it enacts. In the federal system, separation of powers principles would preclude Congress from appealing a decision holding a federal statute unconstitutional if the Solicitor General decided not to appeal. See *Lewis* v. *Casey*, No. 94-1511 (June 24, 1996), slip op. 8 n.3 (standing doctrine "has a separation of powers component which keeps courts within certain traditional bounds vis-a-vis the

other branches, concrete adverseness or not"). The Constitution gives the President alone the responsibility to "take Care that the Laws be faithfully executed," Art. II, § 3, and that responsibility includes the authority to conduct litigation on behalf of the United States in the federal courts. *Buckley* v. *Valeo*, 424 U.S. 1, 138-139 (1976). The Constitution gives Congress only "legislative Powers," Art. 1, § 1, and the "power to seek judicial relief cannot possibly be regarded as merely in aid of the legislative function." *Buckley*, 424 U.S. at 138. Congress may, at times, disagree with an Executive Branch decision not to appeal. Under the Constitution, however, it does not have authority to override such a decision by taking an appeal itself.[5] Just as Congress cannot overrule Executive action directly by means of a legislative veto, *INS* v. *Chadha*, 462 U.S. 919 (1983), Congress cannot accomplish the same result indirectly by invoking the assistance of the federal courts to prosecute its disagreement with the Executive Branch.[6]

---

[5] Cf. 2 U.S.C. 288e(a) (the Senate Legal Counsel "shall be authorized to intervene only if standing to intervene exists under section 2 of Article III of the Constitution of the United States").

[6] In *Burke* v. *Barnes*, 479 U.S. 361 (1987), we argued (Gov't Br. 12-30; Gov't Reply Br. 3-11) that neither Congress nor its Members had standing under Article III to bring an action in federal court challenging the President's conclusion that a bill did not become a law by virtue of the "Pocket Veto Clause" of the Constitution, Art. I, § 7, Cl. 2. The Court did not reach the congressional standing question because it concluded that the controversy had become moot. 479 U.S. at 363, 364 n. *; see also *id.* at 366 (Stevens, J., dissenting) (stating that there was a "serious question" of the standing of the Senate

The question whether a state legislature has standing to appeal on behalf of the State if the responsible officials of the State's executive branch choose not to appeal a decision holding a state statute unconstitutional depends on how the State allocates power among its branches of government. See *Dryer* v. *Illinois*, 187 U.S. 71, 84 (1902) ("Whether the legislative, executive and judicial powers of a State shall be kept altogether distinct and separate, or whether persons or collections of persons belonging to one department may, in respect to some matters, exert powers which, strictly speaking, pertain to another department of government, is for the determination of the State."). In States that adhere to the federal model of separation of powers, the legislature would not have standing to appeal. For example, States commonly give their Attorneys General exclusive authority to represent the State's interests in litigation. 7A C.J.S. *Attorney General* § 11(c) (1980) (citing cases); see also *Mountain States Legal Found.* v. *Costle*, 630 F.2d 754, 771 (10th Cir. 1980), cert. denied, 450 U.S. 1050 (1980). In such States, if the Attorney General acquiesces in a judicial decision holding a state law unconstitutional, a state legislature would not have standing to appeal. Only if state law affirmatively authorizes the legislature to represent the State's interest in litigation would a legislature have standing to appeal. *Karcher* v. *May*, 484 U.S. 72, 82 (1987).

Thus, if AOE were analogized to a state legislature, it would have standing to appeal only if state law authorized it to represent the State's interest in

---

and the 33 individual Members of the House of Representatives who were plaintiffs in the case).

litigation. Article XXVIII does not itself authorize AOE to represent the State's interest in litigation challenging that provision. As petitioners note (Br. 43), Arizona law gives an individual or organization that sponsors ballot initiatives certain "specific duties and rights." But those duties and rights are confined to the initiative process itself, and they end as soon as that process comes to a close. See generally Ariz. Rev. Stat. Ann. § 19-101 *et seq.* (1990). Petitioners have not cited any provision of Arizona law that authorizes the sponsor of an initiative to represent the State's interest in litigation arising under or challenging a law or constitutional amendment that was adopted through the initiative process. For that reason, even assuming the court of appeals correctly analogized AOE to a state legislature, the court erred in concluding that AOE has standing to appeal in order to defend Article XXVIII.

b. In holding that a legislature automatically has standing to appeal when the executive branch declines to do so, the court of appeals relied (J.A. 165-166 & n.2) on this Court's decisions in *Karcher* v. *May*, *supra*; *Coleman* v. *Miller*, 307 U.S. 433 (1939); and *INS* v. *Chadha*, 462 U.S. 919, 940 (1983). Those decisions do not establish such a rule.

In *Karcher*, the President of the New Jersey Senate and the Speaker of the General Assembly intervened in the district court on behalf of the state legislature to defend a state statute against a constitutional challenge. The district court held the statute unconstitutional, and the court of appeals affirmed. This Court dismissed the two legislators' appeal of the court of appeals' judgment, because they had lost their positions prior to the appeal and therefore ceased to be "parties" for purposes of the

Court's jurisdiction under 28 U.S.C. 1254. 484 U.S. at 77-81. The Court also held that the New Jersey legislature and the two legislators were proper parties in the court of appeals. *Id.* at 81-82. But that was because the New Jersey Supreme Court had authoritatively construed state law to authorize the state legislature and its leaders to represent the State's interest in court. *Ibid.* *Karcher* therefore does not hold that a state legislature always has a legally protected interest in defending the constitutionality of legislation that it has passed. *Karcher* stands for the more limited proposition that a state legislature has Article III standing to appeal a federal court judgment holding a state law unconstitutional when state law authorizes the legislature to represent the State's interest in court.

In *Coleman*, state senators brought a mandamus action in the Kansas Supreme Court against the secretary of the state senate to contest the participation of the State's lieutenant governor in a vote of the state senate approving ratification of a proposed amendment to the United States Constitution. 307 U.S. at 435-436.[7] The Court held that the legislators had standing to seek review in this Court of an adverse decision by the Kansas Supreme Court because the legislators' interest "in maintaining the effectiveness of their votes" (*id.* at 438) had been "treated by the state court as a basis for entertaining and deciding the federal questions" (*id.* at 446).

[7] Article V of the Constitution provides that a constitutional amendment, duly proposed, shall be valid "when ratified by the Legislatures of three fourths of the several States." The state senators contended that, for purposes of Article V, the Lieutenant Governor should not be regarded as part of the state "Legislatur[e]."

Coleman therefore holds only that state law may give a legislator an interest in the effectiveness of his vote within the state legislative process that is sufficient to give this Court jurisdiction over an appeal from a state court decision that affects that interest. *Coleman* does not suggest that the legislators would have had standing to initiate litigation in federal court. *Barnes* v. *Kline*, 759 F.2d 21, 62-63 (D.C. Cir. 1985) (Bork, J., dissenting), vacated as moot, 479 U.S. 361 (1987). It does not suggest that a legislator has a legally cognizable interest in an effective vote that exists independent of state law. And it does not suggest that such an interest would be implicated in a case in which the vote on a bill was counted correctly, the bill became law, and the law is subsequently challenged on substantive constitutional grounds. *Coleman* is therefore inapposite here.

In *Chadha*, one House of Congress "vetoed" the suspension of an alien's deportation pursuant to a legislative veto provision in the Immigration and Nationality Act, 8 U.S.C. 1254(c)(2) (1976). The Attorney General ordered the alien deported following the exercise of the one-House veto, and the alien sought judicial review of the final order of deportation. In the court of appeals, the INS agreed with the alien that the legislative veto provision was unconstitutional, and the court of appeals so held and set aside the order of deportation. The INS then appealed to this Court from the judgment that prohibited it from deporting the alien. 462 U.S. at 928. The Court held that the INS was aggrieved by the court of appeals' decision holding an Act of Congress unconstitutional, and therefore was entitled to take an appeal pursuant to 28 U.S.C. 1252 (1976). 462 U.S. at 929-931.

The Court in *Chadha* further held that because the INS was seeking to deport the alien, there was a "case or controversy" under Article III between the INS and the alien. 462 U.S. at 939-940. In that regard, the Court noted that "Congress is the proper party to defend the validity of a statute when an agency of the government, as a defendant charged with enforcing the statute, agrees with plaintiffs that the statute is * * * unconstitutional." *Id.* at 940. That statement does not suggest, however, that Congress would have had authority to appeal if the responsible Executive Branch officials had declined to do so. Rather, that statement simply means that, when there is already a case or controversy before the court, and the Executive Branch agrees with the other party that the statute is unconstitutional, Congress is an appropriate entity to offer a defense of the statute. This Court often invites someone to argue as amicus curiae in support of the judgment when the United States adopts the same view as its opposing party on an issue before this Court, even though the person invited to participate as amicus obviously would not have Article III standing to prosecute the case as a party. *E.g.*, *Ornelas* v. *United States*, 116 S. Ct. 1657, 1661 n.4 (1996) (noting that a member of the bar of this Court had been invited to argue as amicus curiae in support of the judgment). Congress's role in *Chadha* is consistent with that practice.[8]

[8] The Court in *Chadha* cited two decisions as authority for Congress's role in that case. 462 U.S. at 940. Those decisions, *Cheng Fan Kwok* v. *INS*, 392 U.S. 206, 210 n.9 (1968), and *United States* v. *Lovett*, 328 U.S. 303, 304 (1946), support the understanding of *Chadha* discussed above. In *Cheng Fan Kwok*, the Court invited a member of the Bar of the Court to appear as amicus curiae in support of the judgment on a statutory issue after the INS aligned itself with the petitioner on the question before the Court. 392 U.S. at 210 n.9. In *Lovett*, the Solicitor General filed a petition for a writ of certiorari on behalf of the United States, but agreed with respondents that a federal statute was unconstitutional. 328 U.S. at 306. By special leave of Court, Congress appeared as amicus curiae to defend the statute. *Id.* at 304, 306.

c. Even if it is assumed that a state legislature always has Article III standing to defend the constitutionality of a state statute, the Ninth Circuit's analogy between AOE and a legislature is misconceived. The fundamental attributes of a legislature are that its members are elected by the people and it is vested with the "authority to make laws." *Buckley*, 424 U.S. at 139 (quoting *Springer* v. *Philippine Islands*, 277 U.S. 189, 202 (1928)). AOE does not have either of those attributes.

AOE is an unincorporated association (Pet. Rule 29.1 Statement). AOE is not elected by the people, and the individual citizens who voted in favor of Article XXVIII in the referendum did not thereby select AOE to be their representative. Indeed, many supporters of an initiative might not be supporters of the initiative's sponsors, and thus might vote for the initiative *despite* their disapproval of the sponsors.

Although AOE proposed the initiative that led to the enactment of Article XXVIII, AOE itself did not enact the amendment, nor could it. Under the Arizona Constitution, the power to enact laws and constitutional amendments through the initiative process is vested in the people of Arizona. Ariz. Const. Art. IV. Arizona voters, not AOE, enacted Article XXVIII by casting ballots at the polls. And the voters, not AOE,

have the power to amend or repeal Article XXVIII in the future.

AOE's drafting of Article XXVIII does not warrant treating AOE like a legislature. Legislation is often drafted by legislative staff members or even lobbyists. The performance of that task cannot transform an unelected association without the power to enact laws into the functional equivalent of a legislature.[9]

2. Relying on *Local 751*, AOE asserts (Br. 42-43) that it has "representational standing" to defend Article XXVIII on behalf of "the people of Arizona." Nothing in *Local 751*, however, suggests that AOE enjoys representational standing.

As *Local 751* reaffirms, one requirement for representational standing is that the persons represented must have standing in their own right. 116 S. Ct. at 1534-1535. That requirement is not satisfied here. The only harm suffered by any individual citizen of Arizona as a result of the decisions below is the generalized one of not having one of the State's laws enforced. That generalized injury is insufficient to satisfy Article III. *Lujan*, 504 U.S. at 573-574.

---

[9] Because AOE cannot vote, it also could not be analogized to an individual legislator. Moreover, even if a legislature has Article III standing to taken an appeal in a case involving the constitutionality of its enactments, individual legislators do not, for the interest that they would be asserting is one that belongs to the legislature as a collective body, rather than to individual members. See *Bender* v. *Williamsport Area School District*, 475 U.S. 534, 544 (1986) (appellant's status as member of school board "does not permit him to 'step into the shoes of the Board' and invoke its right to appeal"; "[g]enerally speaking, members of collegial bodies do not have standing to perfect an appeal the body itself has declined to take").

Local 751 also makes clear that representational standing is confined to relationships "recognized either by common-law tradition or by statute" that "rebut the background presumption * * * that litigants may not assert the rights of absent third parties." 116 S. Ct. at 1536. AOE does not identify any "common-law tradition or * * * statute" that permits an unincorporated association to sue or be sued on behalf of the entire population of a State. AOE is effectively asserting a variation on *parens patriae* standing, and the right to act as *parens patriae* belongs exclusively to the State itself. See generally *Alfred L. Snapp & Son, Inc.* v. *Puerto Rico ex rel. Barez*, 458 U.S. 592 (1986).

3. AOE also argues (Br. 46) that it has suffered concrete Article III injury because it devoted time and money to sponsoring the ballot initiative. The time and money that AOE devoted to the initiative effort were not incurred because of the decisions below, however, and they would not be recouped if those decisions were reversed. As a result, there is no "causal relationship" (*Local 751*, 116 S. Ct. at 1533) between the costs that AOE has incurred and the judicial decisions about which it complains.

4. AOE contends that, because state officials cannot be counted on to defend initiatives, the sponsors of the initiative should have standing to defend them. Pet. 42, 45. AOE does not cite any evidence, however, that state officials are less willing to defend initiatives than other state laws. Even if they were, however, that fact would not suggest that private individuals or entities have standing under Article III

of the Constitution to represent the State's interests in federal court.[10]

If persons within the State believe that responsible state officials have unwisely failed to appeal a federal court decision, their remedy is a political one. "[O]ur system provides for changing members of the political branches when dissatisfied citizens convince a sufficient number of their fellow electors that their elected representatives are delinquent in performing duties committed to them." *United States* v. *Richardson*, 418 U.S. 166, 179 (1974). The voters in Arizona are not without such a remedy here. See Ariz. Const. Art. VIII, Pt. 1 (any elected official holding public office is subject to recall by the qualified electorate).

C. Park's Standing To Enforce Article XXVIII In State Court Does Not Give Him Standing To Seek Appellate Review In Federal Court

The court of appeals predicated Park's standing on Section 4 of Article XXVIII, which provides that any "person who resides in or does business in" Arizona "shall have standing to bring suit to enforce" Article XXVIII in state court. J.A. 169-171. The existence of Section 4, however, does not establish that the decisions below impose an injury in fact on Park.

States may create interests, the invasion of which create standing. *Diamond*, 476 U.S. at 65 n.17. In such cases, however, the requirements of Article III

[10] Section 4 of Article XXVIII contains a mechanism for private persons to enforce the restrictions of Article XXVIII in *state* court. See p. 24, *infra*. As a result, AOE's lack of standing to appeal in federal court does not preclude supporters of the initiative in which Article XXVIII was approved from having any role in its implementation and enforcement.

must still be met. *Ibid.* A state resident's generalized interest in the enforcement of a law is insufficient to satisfy Article III, and that interest cannot be converted into a particularized injury simply because state law denominates it as such. *Lujan*, 504 U.S. at 571-578. The provision conferring standing on Park to enforce Article XXVIII in state court therefore does not relieve him of the requirement of demonstrating that he would suffer personal and individualized harm from the decisions below. *Ibid.* Park has not made such a showing. In particular, he has not identified any way in which he would suffer personal harm if Yniguez were permitted to speak Spanish while working for the State.

In addition, as already discussed, the sole effect of the district court's declaratory judgment is to preclude the *State* from enforcing Article XXVIII against Yniguez. That judgment does not prevent Park from exercising his right under Section 4 to enforce Article XXVIII in state court. In such a suit, the state courts would be free to exercise their own independent judgment concerning whether Article XXVIII satisfies constitutional standards; they would not be bound by the decisions below in this case. *Asarco, Inc.* v. *Kadish*, 490 U.S. 605, 617 (1989) ("state courts * * * possess the authority, absent a provision for exclusive federal jurisdiction, to render binding judicial decisions that rest on their own interpretation of federal law"); *Lockhart* v. *Fretwell*, 506 U.S. 364, 376 (1993) (Thomas, J., concurring) (Supremacy Clause does not require state courts to follow rulings by federal courts of appeals on questions of federal law); *Freeman* v. *Lane*, 962 F.2d 1252, 1258 (7th Cir. 1992) (same). Thus, the district court's decision in this case does not affect Park's

right under Section 4 to enforce Article XXVIII in state court.

Finally, Yniguez's departure from her state job eliminated whatever controversy might otherwise have existed between her and Park by virtue of Section 4. Park could not "enforce" Article XXVIII by bringing suit against Yniguez under Section 4, because Yniguez could not violate Article XXVIII once she ceased to be a State employee.[11]

CONCLUSION

For the reasons discussed, petitioners do not have standing to seek appellate review.

Respectfully submitted.

WALTER DELLINGER
Acting Solicitor General
FRANK W. HUNGER
Assistant Attorney General
EDWIN S. KNEEDLER
Deputy Solicitor General
STEPHEN W. PRESTON
Deputy Assistant Attorney General
IRVING L. GORNSTEIN
Assistant to the Solicitor General
ANTHONY J. STEINMEYER
SCOTT MC INTOSH
Attorneys

JULY 1996

---

[11] Because petitioners do not have standing, the constitutionality of Article XXVIII is not properly before the Court.